

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re:)	
)	
Transaction Network Services, Inc., TSYS)	CC Docket No. 95-155
Acquiring Solutions, LLC, and Electronic)	
Payment Systems, LLC)	
)	
Regarding FCC Jurisdiction and RespOrg)	
Responsibilities to Comply with Part 52 of)	
the FCC's Rules and the SMS/800 Tariff)	
Requirements)	

To: Office of the Secretary
Attn: Chief, Wireline Competition Bureau

**TRANSACTION NETWORK SERVICES, INC.'S OPPOSITION TO
ELECTRONIC PAYMENT SYSTEMS, LLC'S APPLICATION FOR REVIEW
OF DECLARATORY RULING OF THE WIRELINE COMPETITION BUREAU**

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April 11, 2011

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EXHIBIT A

EXHIBIT B

CERTIFICATE OF SERVICE

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**TRANSACTION NETWORK SERVICES, INC.'S OPPOSITION TO
ELECTRONIC PAYMENT SYSTEMS, LLC's APPLICATION FOR REVIEW
OF DECLARATORY RULING OF WIRELINE COMPETITION BUREAU**

I. INTRODUCTION AND SUMMARY

Transaction Network Services, Inc. ("TNS") is an international data communications company headquartered in Reston, Virginia. It provides data communications services to major processors of payment card transactions such as TSYS Acquiring Solutions, LLC ("TSYS") by securely transmitting payment transaction data between merchant payment card terminals at the point-of-sale and the processor's network. TNS has a direct interest in this matter; it is the Responsible Organization¹ chosen and appointed by TSYS for three of the toll-free numbers at

¹ A Responsible Organization (RespOrg) is "[t]he entity chosen by a toll free subscriber to manage and administer the appropriate records in the toll free Service Management System for the toll free subscriber." 47 C.F.R. § 52.101(b). A RespOrg is "[t]he entity that has total responsibility for the account management of a particular toll-free number, including maintaining its customer record in the [toll-free Service Management System]." 800 Service Management System (SMS/800) Functions, Tariff FCC No. 1 ("SMS/800 Tariff"), § 2.7, *available at* <http://www.sms800.com/PublicContent.aspx?Text=Tariff&URL=Shared Documents/Public/SMS^800 Documents/Tariff&Site=Public>.

issue here,² and it participated in proceedings before the Wireline Bureau. The TNS-Administered Numbers currently are used to securely transmit payment transaction data for over 70 million transactions a month between more than one-half million merchant terminals throughout the United States and TSYS' transaction processing network through TNS' network. TNS was drawn into this matter because, on January 10, 2011, Electronic Payment Systems ("EPS") caused TNS to be served with a Writ of Execution issued by the United States District Court for the Eastern District of Virginia that demanded TNS to turn over the TNS-Administered Numbers to EPS.

In light of the Writ of Execution, on January 24, 2011, TSYS filed a petition ("Petition") with the Commission seeking, among other things, a declaration that "RespOrgs may not, without explicit authority from the FCC, transfer toll free numbers between unaffiliated subscribers."³ On February 24, 2011, and over the opposition of EPS, the Wireline Bureau issued a Declaratory Ruling, which (among other things) clarified that TNS may not transfer the TNS-Administered Numbers to EPS.⁴

On March 24, 2011, EPS filed an Application for Review ("Application") of the Declaratory Ruling. The Application is a dodge; it fails to challenge the Declaratory Ruling head-on. And its rather threadbare legal argument does nothing to undermine the conclusion that TNS may not transfer the TNS-Administered Numbers to EPS. The Application should be denied.

² The toll-free numbers at issue are 800-370-8507, 877-488-0358, and 800-411-6902, which will be referred to hereinafter as the "TNS-Administered Numbers."

³ Petition, *In re Transaction Network Services, Inc., TSYS Acquiring Solutions, LLC, and Electronic Payment Systems, LLC*, CC Docket No. 95-155, at ii (filed Jan. 24, 2011).

⁴ *In re Transaction Network Services, Inc., TSYS Acquiring Solutions, LLC, and Electronic Payment Systems, LLC*, CC Docket No. 95-155, 2011 WL 682280, at *2 (¶ 8) (WCB Feb. 24, 2011) ("Declaratory Ruling") at ¶ 8.

II. BACKGROUND

The Arbitral Award. The present proceeding has its genesis in a business dispute between TSYS and EPS. Following repeated fee disputes relating to an agreement under which TSYS provides processing services for EPS merchants' payment card transactions, TSYS and EPS submitted their dispute to binding arbitration.⁵ In early 2009, the arbitration culminated in an arbitral award in favor of EPS (the "Arbitral Award") that included, among other things, an order for "TSYS to provide EPS with immediate and continuous ownership, control and access to the toll free 1-800 number that connects EPS' merchants to a processor."⁶

The Arizona Amended Judgment. Following the issuance of the Arbitral Award, TSYS and EPS took their dispute to the United States District Court for the District of Arizona, with EPS seeking a judgment enforcing the Arbitral Award and TSYS seeking to have the Arbitral Award vacated. On May 4, 2010, the District of Arizona issued a judgment ("the Arizona Amended Judgment") confirming the Arbitral Award but without providing any clarity as to how to effectuate the Arbitral Award's order to transfer "the toll free 1-800 number that connects EPS' merchants to a processor."⁷ TSYS and EPS continue to litigate in the District of Arizona over how to interpret the Arbitral Award and how to effectuate the Arizona Amended Judgment.

⁵ Petition at 4.

⁶ *TSYS Acquiring Solutions, LLC v. Electronic Payment Systems, LLC*, No. CV-09-155-PHX-JAT, slip op. at 2 (filed Jan. 28, 2011) (order granting motion to compel) (quoting the Arbitral Award).

⁷ Amended Judgment, *TSYS Acquiring Solutions, LLC v. Electronic Payment Systems, LLC*, No. CV-09-155-PHX-JAT, slip op. at ¶ 5 (filed May 4, 2010). TSYS then filed a declaratory judgment action in the District of Arizona seeking clarification of the meaning of the Arbitral Award. The court rejected this request for clarification and TSYS is appealing that ruling to the United States Court of Appeals for the Ninth Circuit. Petition at 5-6.

The Writ of Execution. In an attempt to enforce the Arizona Amended Judgment and the Arbitral Award, EPS domesticated the Arizona Amended Judgment in the United States District Court for the Eastern District of Virginia,⁸ and caused a Writ of Execution to be issued from that court upon TNS. The Writ of Execution demands that TNS turn over “the goods and chattels, lands and tenements in [its] district belonging to: TSYS Acquiring Solutions, LLC and held by [TNS],” specifically, the “[TNS-Administered Numbers] and all documents necessary to provide [EPS] with immediate and continuous ownership control, and access to said numbers.”⁹

The Declaratory Ruling. On January 24, 2011, in light of the Writ of Execution, TSYS filed its Petition with the Commission asking the Commission to “exercise its exclusive jurisdiction over toll free numbering” and to declare, among other things, that “RespOrgs may not, without explicit authority from the FCC, transfer toll free numbers between unaffiliated subscribers.”¹⁰ TNS filed a response to the Petition, urging the Commission to clarify that it is not authorized in this case “to transfer toll-free numbers between unaffiliated subscribers.”¹¹ EPS filed an opposition to the Petition.¹²

On February 24, 2011, the Wireline Bureau issued the Declaratory Ruling in order “to provide guidance on Commission rules regarding the distribution and transfer of numbers, and to

⁸ *TSYS Acquiring Solutions, LLC v. Electronic Payment Systems, LLC*, No. 1:10-mc-00043-LO (E.D. Va. filed Aug. 10, 2010).

⁹ Writ of Execution, *TSYS Acquiring Solutions, LLC v. Electronic Payment Systems, LLC*, No. 1:10-mc-00043-LO, at Schedule A (E.D. Va. Dec. 15, 2010).

¹⁰ *In re Transaction Network Services, Inc., TSYS Acquiring Solutions, LLC, and Electronic Payment Systems, LLC*, CC Docket No. 95-155, at ii (filed Jan. 24, 2011).

¹¹ Transaction Network Services, Inc.’s Response to TSYS Petition at 10.

¹² See generally Electronic Payment Systems, LLC’s Opposition to TSYS’ Petition.

ensure that RespOrgs do not transfer numbers in violation of Commission orders and rules.”¹³

The Bureau began by highlighting its exclusive jurisdiction over the North American Numbering Plan—including over toll-free numbers.¹⁴ The Bureau then reaffirmed that “no one had a property interest in a telephone number,” and similarly, that “[n]o individual or entity (e.g., subscriber, service provider) has a proprietary interest in any given toll-free number.”¹⁵ More specifically, the Bureau emphasized that the SMS/800 Tariff (which regulates “the provision of [SMS/800] functions and support services for toll free telephone numbers”¹⁶) prohibits TNS from transferring the TNS-Administered Numbers to EPS.¹⁷

The Bureau then explained that both the Arbitral Award and the Arizona Amended Judgment conflict with these rules and regulations. Accordingly, the Bureau ordered that TNS could not transfer the TNS-Administered Numbers to EPS notwithstanding the Arbitral Award and the Arizona Amended Judgment.¹⁸ And the Bureau cautioned that TNS would risk the termination of its status as a RespOrg if it were to violate the rules and regulations pertaining to toll-free numbers.¹⁹ To ensure that the TNS-Administered Numbers would not be improperly transferred to EPS, the Bureau ordered Database Service Management, Inc. (“DSMI”)—the Toll-

¹³ Declaratory Ruling at ¶ 6.

¹⁴ *See id.* at ¶ 7.

¹⁵ *Id.* at ¶¶ 7, 8.

¹⁶ 800 Service Management System (SMS/800) Functions, Tariff FCC No. 1 (“SMS/800 Tariff”), § 1.1, *available at* <http://www.sms800.com/PublicContent.aspx?Text=Tariff&URL=Shared Documents/Public/SMS^800 Documents/Tariff&Site=Public>.

¹⁷ Declaratory Ruling at ¶ 8.

¹⁸ *See id.* at ¶ 9.

¹⁹ *See id.* at ¶ 8.

Free Number Administrator—not to honor any RespOrg requests to transfer the TNS-Administered Numbers to EPS.²⁰

Withdrawal of the Writ of Execution. Relying in part on the Declaratory Ruling, both TNS and TSYS filed motions in the Eastern District of Virginia seeking to quash the Writ of Execution. Rather than oppose these motions, EPS elected to withdraw the Writ of Execution.²¹ Accordingly, the court issued an order dismissing that action without prejudice.²² However, EPS has made clear that it intends to “seek a new Writ of Execution” in the future.²³ Thus, despite the withdrawal of the Writ of Execution, TNS remains under the threat of a new Writ of Execution.

Application for Review. On March 24, 2011, EPS filed its Application in order to seek full Commission review of the Declaratory Ruling. However, EPS did not challenge the Commission’s jurisdiction; nor did EPS challenge the primary rulings of the Bureau—that no one maintains a proprietary interest in a toll-free number and that TNS may not transfer the TNS-Administered Numbers to EPS. Instead, EPS sought review of two narrow, fact-bound questions:

1. Where two or more unaffiliated commercial entities enter into a voluntary agreement to transfer the subscriber’s interest in toll free numbers in order to facilitate the continuation of business without interruption, (and there is no sale, hoarding, or brokering), can such transfer be accomplished through execution of a transfer of service agreement which indicates all parties, including the FCC, have been notified of the change?

²⁰ See *id.* at ¶ 10.

²¹ See Electronic Payment Systems, LLC’s Notice of Withdrawal of its Writ of Execution Without Prejudice, *TSYS Acquiring Solutions, LLC v. Electronic Payment Sys., LLC*, No. 1:10mc43 (E.D. Va. filed Mar. 25, 2011) (“Notice of Withdrawal”) (attached hereto as Exh. A).

²² Order, *TSYS Acquiring Solutions, LLC v. Electronic Payment Sys., LLC*, No. 1:10mc43 (E.D. Va. filed Mar. 29, 2011) (attached hereto as Exh. B)

²³ Notice of Withdrawal, Exh. A at 2.

If the answer to Question 1 is “no”, then:

2. Where two or more unaffiliated commercial entities enter into a voluntary agreement to transfer the subscriber's interest in toll free numbers in order to facilitate the continuation of business without interruption, (and there is no sale, hoarding, or brokering), should the FCC approve such transfer even in the absence of “extraordinary circumstances involving public safety”?²⁴

Neither of these questions implicate RespOrgs.

III. THE WIRELINE BUREAU CORRECTLY RULED THAT TNS MAY NOT TRANSFER THE TNS-ADMINISTERED NUMBERS TO EPS.

Commission regulations authorize a RespOrg only to manage and administer the appropriate records in the toll-free Service Management System (“SMS/800”). The SMS/800 Tariff specifically prohibits “[a]ll entities, (e.g., Resp Orgs, subscribers, service providers), . . . from selling, brokering, bartering, and releasing for a fee (or otherwise) any toll-free number.”²⁵ In addition, the “System Security” provisions of the SMS/800 Tariff require a RespOrg to prevent security breaches by allowing unauthorized access to or transfer of toll-free numbers.²⁶ The SMS/800 Tariff further limits the scope of actions a RespOrg may undertake by prohibiting RespOrgs from “perform[ing] any functions using the SMS/800 which are not expressly provided for under this tariff.”²⁷ And violation of this prohibition may result in termination of the entity’s status as a RespOrg.²⁸

²⁴ Application at 2.

²⁵ *Id.* § 2.3.1(A)(8). In addition, both Commission regulations and the SMS/800 Tariff prohibit warehousing, hoarding, and the sale of toll-free 1-800 numbers. *See* 47 C.F.R. § 52.105, 107; SMS/800 Tariff § 2.2.2.

²⁶ *See generally id.* § 2.3.5.

²⁷ *Id.* § 2.2.1.

²⁸ *Id.* (“Any violation of this paragraph may result in immediate termination of service by the Company.”).

The Bureau well understood this. It emphasized that “[n]o individual or entity . . . has a proprietary interest in any given toll-free number.”²⁹ And it properly relied on the SMS/800 Tariff in concluding that, “notwithstanding the [Arbitral Award] that the toll free numbers belong to EPS, and the [Arizona Amended Judgment ordering] TSYS [to] transfer the seven toll free numbers to EPS,” the RespOrgs here “are prohibited from transferring or reassigning those numbers.”³⁰ Moreover, the Bureau warned of the serious consequences for violators of its rules: “If a RespOrg—such as TNS . . . —violates these provisions . . . , its status as a RespOrg is subject to termination.”³¹

IV. EPS’ WEAK LEGAL ARGUMENTS ARE NOT TO THE CONTRARY.

As noted above, EPS does not challenge the Declaratory Ruling head on. Instead, it raises two narrow questions, neither of which directly implicates RespOrgs. Unsurprisingly, EPS’ two legal arguments miss the mark. Its first argument is premised upon a misunderstanding of non-binding industry guidelines relating to the assignment of telephone numbers that are not at issue here. Its second argument—that the Declaratory Ruling is contrary to case law—relies upon a single unpublished district court case that is both factually and legally distinguishable.

1. The Industry Guidelines EPS Relies Upon Are Irrelevant And, In Any Event, Have No Legal Force.

EPS argues that the Declaratory Ruling is somehow contrary to existing Commission regulations; however, it bases this argument not on any applicable federal regulation but rather on industry guidelines set out by a committee of the Alliance For Telecommunications Industry

²⁹ Declaratory Ruling at ¶ 8.

³⁰ *Id.* at ¶¶ 8-9.

³¹ *Id.* at ¶ 8.

Solutions, Inc. (“ATIS”). Industry guidelines, of course, lack the force of law and thus have no bearing on the interpretation of Commission rules and regulations.

EPS first errs by citing to the ATIS 555 NXX Guidelines,³² which do not even pertain to toll-free numbers. The 555 NXX Guidelines relate to numbers used for the provisioning of information services, which are not implicated in this dispute.

Even setting aside EPS’ confusing citation to these inapposite guidelines, EPS’ argument fares no better. Even the ATIS Guidelines that relate to 800 numbers have no bearing here. First, the 800-855 Number Assignment Guidelines relate solely to a unique set of numbers used to access public services “intended for the deaf, hard of hearing, and speech impaired.”³³ More importantly, these guidelines, by their nature, have no legal force. Indeed, the 800-855 Number Assignment Guidelines themselves include a provision indicating that they “do not supersede controlling appropriate NANP area governmental or regulatory principles, procedures and requirements.”³⁴ In addition, these guidelines contain the express disclaimer that: “NO REPRESENTATION IS MADE THAT THE [GUIDELINES] . . . CONFORM[] TO ANY STATUTE, GOVERNMENTAL RULE, OR REGULATION.”³⁵ Accordingly, it is quite clear that these guidelines cannot possibly undermine the conclusion that TNS may not transfer the TNS-Administered Numbers to EPS.

2. The *Ford Motor* Case Is Both Factually And Legally Distinguishable.

It is quite telling that EPS cites but one case—*Ford Motor Co. v. U.S. Auto Club*, 2008 WL 4387077 (N.D. Tex. Sept. 26, 2008), an unpublished district court case—for its argument

³² Application at 7.

³³ ATIS 800-855 Number Assignment Guidelines § 1.0, *available at* <http://www.atis.org/inc/Docs/finaldocs/800-855-Number-Assignment-Guidelines-Final-Documents-111210.doc>.

³⁴ *Id.* at § 1.3.

³⁵ *Id.* (Notice of Disclaimer & Limitation of Liability).

that the Bureau's ruling is contrary to case law. To be sure, the district court in *Ford Motor* held that Commission rules and regulations did not prohibit a particular contractual transfer of toll-free numbers that were originally held by Ford from Auto Club (a vendor providing Ford with roadside assistance services) to Cross Country (Ford's new roadside assistance vendor) pursuant to the termination provisions of a service contract between Ford and Auto Club for the performance of Ford's roadside assistance programs.³⁶ However, a review of *Ford Motor* reveals that this case is both factually and legally distinguishable.

Ford Motor is factually distinguishable. The district court itself recognized that the case was a one-off, emphasizing that its ruling was limited to "the facts of this case."³⁷ Moreover, the court highlighted the fact that Ford originally held the toll-free numbers at issue, explaining that, as a matter of equity, prohibiting the transfer would improperly allow Auto Club to "have [its] cake and eat it too" because if the transfer were unlawful, then the original transfers of the numbers to Auto Club would have been unlawful as well.³⁸

Ford Motor is legally distinguishable as well, as the court did not even mention, much less consider the impact of the SMS/800 Tariff.³⁹ Moreover, the court noted that the question of the transferability of the specific toll-free numbers at issue presented "a technical issue . . . within the expertise of the FCC" and emphasized that the Commission had not acted to clarify the scope of its regulations governing the transfer of toll-free numbers.⁴⁰ Indeed, the opinion strongly implies that the outcome could well have been different if the Bureau had spoken on the

³⁶ See *Ford Motor*, 2008 WL 4387077, at * 5 & n.4.

³⁷ *Id.* at *5.

³⁸ *Id.* at 5 n.4

³⁹ See generally *id.*

⁴⁰ *Id.* at 2, 4.

issue (which the Bureau has now has done, after considering the facts of *this* case). In any event, *Ford Motor* says nothing about the ability of *RespOrgs* to transfer numbers between subscribers, and the Bureau has made very clear that TNS may not transfer the TNS-Administered Numbers to EPS notwithstanding the Arbitral Award and Arizona Amended Judgment.⁴¹

V. CONCLUSION

For the foregoing reasons, TNS requests that the Commission deny the Application.

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April 11, 2011

⁴¹ See Declaratory Ruling at ¶¶ 9-10.

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)**

TSYS Acquiring Solutions, LLC,

Plaintiff/Judgment Debtor,

V.

Civil Action No. 1:10mc43

Electronic Payment Systems, LLC,

Defendant/Judgment Creditor.

**ELECTRONIC PAYMENT SYSTEMS, LLC'S NOTICE OF WITHDRAWAL OF ITS
WRIT OF EXECUTION WITHOUT PREJUDICE PENDING FURTHER ACTION
BEFORE THE FEDERAL COMMUNICATIONS COMMISSION AND
CONSENT MOTION TO RENDER MOOT AND VACATE HEARING ON MOTIONS
TO QUASH FILED BY PLAINTIFF/JUDGMENT DEBTOR AND TRANSACTION
NETWORK SERVICES, INC.**

Judgment Creditor Electronic Payment Systems, LLC (“EPS”) hereby submits its Notice of Withdrawal of its Writ of Execution Without Prejudice Pending Further Action Before the Federal Communications Commission and Consent Motion to Render Moot and Vacate Hearing on Motions to Quash Filed by Plaintiff/Judgment Debtor and Transaction Network Services, Inc. In support hereof, EPS states as follows:

EPS initiated this action in this Court to enforce a judgment entered by the U.S. District Court for the District of Arizona, affirming an arbitration award in favor of EPS. Specifically, EPS filed for a Writ of Execution to enforce the judgment against TSYS Acquiring Solutions, LLC's ("TSYS") property, in the form of 1-800 numbers, in this Court's jurisdiction held by a third party, Transaction Network Services, Inc. ("TNS"). This Writ of Execution has been the subject of Motions to Quash by both TSYS and TNS.

EPS fully believes it is entitled to pursue execution of a writ pertaining to the 1-800

telephone numbers that have been awarded to it by the arbitrator and the U.S. District Court for the District of Arizona. However, in light of a recent ruling by the Federal Communications Commission (the "FCC"), it appears EPS will need to either (1) obtain approval of the transfer of the numbers from the FCC, or (2) seek a review of the recent ruling by the full FCC to have the ruling amended to make it consistent with other FCC regulations, case law and current FCC practice.

EPS has filed an application for review with the full FCC. Once either of the two above-referenced alternatives have been completed, EPS will then seek a new Writ of Execution and pursue its remedies. Until that time, EPS hereby provides notice that it is withdrawing its Writ of Execution without prejudice.

WHEREFORE, EPS, with the consent of TSYS and TNS, respectfully requests that the Court (1) hold that the Motions to Quash filed by TSYS and TNS are rendered moot and (2) vacate the hearing on these Motions.

Dated: March 25, 2011

Respectfully submitted,

ELECTRONIC PAYMENT SYSTEMS, LLC

By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true copy of the foregoing to be served via the Court's ECF electronic filing system, on this 25th day of March, 2011 upon:

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EXHIBIT B

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

TSYS Acquiring Solutions, LLC,)	
)	
Plaintiff/ Judgment Debtor,)	
)	
v.)	Case No.: 1:10-mc-43
)	
ELECTRONIC PAYMENT SYSTEMS, LLC,)	
)	
Defendant/Judgment Creditor.)	

ORDER

This matter comes before the Court on the Electronic Payment System's Notice of Withdrawal of its Writ of Execution and Consent Motion to Vacate Hearing on Motions to Quash filed by plaintiff (Dkt. No. 30). Upon consideration of the motion and for good cause appearing, the Motions to Quash filed by TSYS and TNS (Dkt. Nos. 5 and 23) are hereby DENIED and the matter is DISMISSED WITHOUT PREJUDICE.

March 29, 2011
Alexandria, Virginia

/s/ ' 29
Liam O'Grady
United States District Judge

CERTIFICATE OF SERVICE

I, Thomas R. McCarthy, hereby certify that on this 11th day of April 2011, a copy of Transaction Network Services, Inc.'s Opposition to EPS' Application for Review of Decision of the Wireline Competition Bureau was served via US Mail on the following:

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